

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GARY B.; JESSIE K., a minor, by  
Yvette K., guardian ad litem;  
CRISTOPHER R. and ISAIAS R.,  
minors, by Escarle R., guardian  
ad litem; ESMERALDA V., a  
minor, by Laura V., guardian ad  
litem; PAUL M.; JAIME R., a  
minor, by Karen R., guardian ad  
litem, on behalf of themselves  
and all others similarly  
situated,

Plaintiffs,

v.

Case No. 16-13292

Hon. Stephen J. Murphy, III

RICHARD D. SNYDER, in his  
official capacity as Governor  
of the State of Michigan; JOHN  
C. AUSTIN, MICHELLE FECTEAU,  
LUPE RAMOS-MONTIGNY, PAMELA  
PUGH; KATHLEEN N. STRAUS,  
CASANDRA E. ULBRICH, EILEEN  
WEISER, and RICHARD ZEILE, in  
their official capacities as  
members of the Michigan Board  
of Education; BRIAN J. WHISTON,  
in his official capacity as  
Superintendent of Public  
Instruction for the State of  
Michigan; DAVID B. BEHEN, in  
his official capacity as  
Director of the Michigan  
Department of Technology,  
Management and Budget; and  
NATASHA BAKER, in her official  
capacity as the State School  
Reform/Redesign Officer,

Defendants.

/

**MOTION TO DISMISS**

BEFORE THE HONORABLE STEPHEN J. MURPHY, III  
United States District Judge  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard  
Detroit, Michigan 48226  
Thursday, August 10, 2017

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EXHIBITS

<u>Identification</u>	<u>Offered</u>	<u>Received</u>
NONE		

1 Detroit, Michigan

2 Thursday, August 10, 2017

3 — — —

4 (Proceedings commenced at 2:02 p.m., all parties  
5 present)

6 THE CLERK: The Court calls Case No. 16-13292, B., et  
7 al versus Snyder, et al.

8 Counsel, please state your names for the record.

9 MR. ROSENBAUM: Good afternoon, Your Honor. Mark  
10 Rosenbaum on behalf of the plaintiffs.

11 THE COURT: Afternoon.

12 MS. FLINT: Your Honor, Tacy Flint on behalf of the  
13 plaintiffs.

14 THE COURT: Welcome.

15 MR. CAMINKER: Your Honor, Evan Caminker on behalf of  
16 the plaintiffs.

17 THE COURT: Welcome to you as well. Okay.

18 MR. HAYNES: Good afternoon, Your Honor. Assistant  
19 Attorney General Timothy Haynes on behalf of the state official  
20 defendants.

21 THE COURT: Welcome to you. Who do you have sitting  
22 up front with you there?

23 MR. HAYNES: I also have Assistant Attorneys General  
24 Katherine Bennett and Joshua Smith present today.

25 THE COURT: Okay. Very good. Welcome to everyone.

1 Thank you very much for being on time. Thank you very much for  
2 the hard work on the case.

3 The schools that the students attend are -- are  
4 deplorable. The buildings are infested with vermin. The  
5 hallways are filthy. The rooms are freezing in the winter,  
6 sweltering in the summer. Books are sparse or non-existent,  
7 teachers are few, changing and uncredentialed. The results of  
8 the schools are dismal. Reading proficiency rates for the  
9 schools is zero. The schools appear to be much worse than most  
10 other Michigan school districts. And the plaintiffs have filed  
11 suit and said the State of Michigan is to blame.

12 Taking the plaintiffs' allegations in the light most  
13 favorable to them, they say that the plaintiffs -- and by the  
14 way, I don't think the State of Michigan disagrees with what I  
15 just said about the schools in the City of Detroit. The state  
16 has controlled Detroit schools since 1999. The plaintiffs say  
17 that the state officials are responsible for the students'  
18 plight and are the appropriate parties to enjoin going forward.

19 The state has lodged a lengthy 60-plus-page brief in  
20 support of a motion to dismiss the claims, and we have  
21 scheduled today's date and time for hearing and I'm pleased to  
22 discuss the issues with the lawyers and see if we can't resolve  
23 the motion.

24 So you want to start, Mr. Haynes?

25 MR. HAYNES: Thank you, Your Honor.

1           There is one point that I would take issue with and I  
2   think that we've addressed in our brief --

3           THE COURT: Uh-huh.

4           MR. HAYNES: -- as to a statement that you just made,  
5   Your Honor. We -- we do not concede that the state has  
6   controlled the schools in the City of Detroit since 1999, and  
7   we've set out the legal inaccuracies of the plaintiffs'  
8   assertions to that effect in our brief and in our response.

9           THE COURT: Well, I should deny your motion and send  
10   the case forward to discover who controls the schools and  
11   whether they or you should be enjoined then, right?

12          MR. HAYNES: No, Your Honor, because those are simply  
13   inaccurate legal conclusions contained in the Complaint.

14          THE COURT: In light of *Iqbal* and *Twombly*, I should  
15   simply overlook them and address your motion on the merits.

16          MR. HAYNES: Correct.

17          THE COURT: Okay. Go ahead.

18          MR. HAYNES: Thank you, Your Honor.

19           The overarching issue in this case is whether there's  
20   a substantive right to literacy under the Constitution. The  
21   Complaint and the plaintiffs claim that literacy or access to  
22   literacy as they prefer to refer to it is a fundamental right,  
23   a constitutionally protected interest under the 14th Amendment,  
24   but the text of the 14th Amendment contains no reference to  
25   literacy or access to literacy.

1 More importantly, while acknowledging the  
2 significance of literacy in society, United States Supreme  
3 Court has consistently and unwaveringly held that education is  
4 not a fundamental right or liberty interest under the 14th  
5 Amendment. The *Brown* case, *San Antonio vs. Rodriguez* and  
6 *Plyler vs. Doe* all reject claims that education is a  
7 substantive right under the 14th Amendment despite  
8 acknowledging the importance of literacy.

9 THE COURT: *Plyler* was -- did *Plyler* involve the  
10 aliens?

11 MR. HAYNES: Correct.

12 THE COURT: Yes. Illegal aliens had no right to  
13 education, and there was clearly no education being given in  
14 that case because the state prohibited children of illegal  
15 aliens from attending schools. Do I have that right?

16 MR. HAYNES: Correct. There was a specific state  
17 enactment, a state statute that -- that prohibited or  
18 eliminated a distinct class of students that were children of  
19 immigrant -- or illegal immigrants from attending the Texas  
20 school system.

21 THE COURT: Right. I don't quite understand how  
22 that's analogous here because obviously we have students who  
23 are in -- in school. Now, I understand -- and we'll talk to  
24 the plaintiffs about what type of education the children get,  
25 if any, and I think their point is that they don't, but -- but

1     how is *Plyler* supportive of the proposition that -- that we  
2     should dismiss this case if there are those factual  
3     distinctions that I just drew up?

4             MR. HAYNES: Your Honor, the plaintiffs are -- have  
5     argued that *Plyler* is the controlling authority here, and as --  
6     as you've already noted, we believe that *Plyler* actually is a  
7     case that would require dismissal. *Plyler* said there was no  
8     substantive due process right to education, literacy is a  
9     bi-product of the education system, and it involved a specific  
10    state enactment, a specific state statute that affected a  
11    discrete group of people.

12            THE COURT: Okay.

13            MR. HAYNES: Here we don't have that. The plaintiffs  
14    don't direct us or the Court to any specific state enactment  
15    that eliminates or excludes a discrete segment of the  
16    population of students from attending the schools of the state.  
17    Instead --

18            THE COURT: Okay. Maybe I asked my question the  
19    wrong way. If I were to determine as a matter of law or fact  
20    that the allegations in the -- in the Complaint of the  
21    plaintiffs constitute a education of some sort, then you -- you  
22    would take the position that *Rodriguez* certainly and *Plyler*  
23    even more so would -- would mandate dismissal of the case  
24    because there's no fundamental right that those two cases --  
25    that those two cases said there's no fundamental right. You're

1 giving education. It may not be -- your schools are giving  
2 education. It may not be great, but it gets you over the  
3 threshold of -- of saying that there -- there is something  
4 that's being given. What's being given is never anything that  
5 the Supreme Court has recognized as -- as actionable, and  
6 therefore as a matter of law, the case has to be dismissed. Is  
7 that...

8 MR. HAYNES: Correct.

9 THE COURT: All right. Okay. Well, let me ask you  
10 then about this opinion that Justice White wrote, *Popasan*  
11 [sic], *Papasan*, I'm not sure of the exact pronunciation.  
12 Certainly the Court alluded to and seemed to reinforce that  
13 a -- an education is not a fundamental right, but it seems  
14 Justice White on behalf of the Court left the door open for the  
15 plaintiffs' claims here. Where, quote, "a system fails to  
16 provide each child an opportunity to -- provide each child with  
17 an opportunity to acquire basic minimal skills necessary for  
18 the enjoyments of rights of speech and full participation in  
19 the political process," there's an opportunity it seems to me  
20 for an equal protection claim.

21 In other words, it doesn't seem settled that -- and I  
22 have a -- a better quote here that suggests that the denial of  
23 an educational opportunity could be the type of right that  
24 might be actionable under that case. Education is not a  
25 fundamental right, but the Court has, quote, "not yet

1 definitively settled the questions whether a minimally adequate  
2 education is a fundamental right and whether a statute alleged  
3 to discriminatorily infringe that right should be accorded  
4 heightened equal protection review."

5           What that seems to me -- what that seems to say to me  
6 is that if, as a matter of fact or law, minimally adequate  
7 education is a fund -- could be a fundamentally -- fundamental  
8 right, and if your scheme discriminate -- discriminatorily  
9 infringes it, I should give heightened equal protection review  
10 to it. But we probably can't get to that point until we  
11 determine whether what the City of Detroit schools are doing is  
12 minimally -- minimally -- I'm sorry, you go ahead and -- and --  
13 and answer. I know I've been speaking -- minimally adequate or  
14 not. Go right ahead, Mr. Haynes.

15           MR. HAYNES: Thank you, Your Honor.

16           Well, as -- as you've said, that's -- that's language  
17 that's pulled out of one either concurring and -- opinion; it  
18 was not part of the decision as a whole. When you look at all  
19 these cases that have dealt in the educational context, while  
20 some of the justices may have discussed this possibility,  
21 there's been no federal case, no Supreme Court case, no circuit  
22 has held that there is a right to a minimally adequate  
23 education. So this Court would be called on to be the first --

24           THE COURT: Right.

25           MR. HAYNES: -- to ever make that conclusion. And

1 frankly, that's language that's found nowhere in the  
2 Constitution.

3 THE COURT: That's pretty unappetizing for me to  
4 consider doing something that's never been done before laid out  
5 in the Constitution, right? So...

6 MR. HAYNES: The second thing I note is in *Papasan*  
7 again, like in the *Plyler* case, the Court was reviewing a  
8 specific state statute.

9 THE COURT: Yes.

10 MR. HAYNES: And those state statutes provided less  
11 funding for some schools based on geographic location. Again,  
12 something that's not present here --

13 THE COURT: Yes.

14 MR. HAYNES: -- is an allegation that a specific  
15 statute is at issue.

16 THE COURT: The plaintiffs will want to talk about  
17 that I'm sure. We have to determine what exactly they're  
18 challenging, but I had not determined or detected that they're  
19 challenging any specific statute or regulation. I -- I -- I  
20 agree with you on that.

21 Go right ahead.

22 MR. HAYNES: The laws defining Michigan's state  
23 school system do not contain any provision that authorizes or  
24 directs the exclusion of students in plaintiffs' schools from  
25 accessing schools that offer an opportunity to attain literacy,

1 for teachers, for books and instruction materials, or safe  
2 conditions.

3 I think as we've demonstrated in our briefs,  
4 plaintiffs' false legal assertions that the state controls  
5 education at these five schools and is therefore somehow  
6 responsible for the deprivation of education that these  
7 children are experiencing is legally inaccurate. Again --

8 THE COURT: Who do you suggest they sue if not the  
9 state?

10 MR. HAYNES: Those that actually deprived these  
11 individuals of teachers; those that failed to maintain  
12 conditions of these buildings; those that are directly  
13 responsible for those conditions. In -- in some instances, the  
14 children attended charter schools, public school academies.  
15 Those are entities that are operated by charter school boards,  
16 they are authorized by either universities, community colleges  
17 or sometimes even school districts or intermediate school  
18 districts. They are governed by that board, not by these state  
19 officials. The -- the authorizer is the one that is required  
20 to ensure that those schools comply with all state and federal  
21 laws, not the state officials.

22 THE COURT: All right.

23 MR. HAYNES: As demonstrated by another case that was  
24 in front of this district that involved a settlement or related  
25 to the conditions of the school buildings, the *AFT vs. Detroit*

1     *Public School Community District* case.

2             THE COURT: Was that Judge Lawson's case?

3             MR. HAYNES: I don't recall if it was Judge Lawson  
4 but it was in this district.

5             THE COURT: All right.

6             MR. HAYNES: Again, that demonstrates that -- that  
7 the district is responsible for maintaining those schools.

8             THE COURT: Yeah.

9             MR. HAYNES: The consent agreement that we attached  
10 to our briefs shows that the City of Detroit is responsible for  
11 inspection of those buildings, so the governor isn't the one  
12 that maintains buildings. You know, our system is set up to be  
13 decentralized. We have local school districts which are  
14 political subdivisions, independent entities for purposes of  
15 constitutional violations, discrimination, harassment, all  
16 those types of claims. The state doesn't become responsible by  
17 some respondeat superiore theory.

18             THE COURT: All right. What else do you want to say?  
19 So you're -- you're -- would it be fair to conclude from what  
20 we've discussed so far that your primary argument is that you  
21 have an *Iqbal/Twombly* position or defense on the wording of  
22 the Complaint, that the -- the -- the allegations are  
23 implausible and can't be sustained because -- I mean I don't  
24 see why that's not a matter of fact that we would have to have  
25 discovery on if that's going to be your -- your -- your primary

1 argument.

2 MR. HAYNES: Because those are all legal conclusions  
3 contained within the Complaint, Your Honor. Local school  
4 districts by operation of the state laws that we've quoted in  
5 our brief, and including the state decisions that have talked  
6 about the state's role versus -- as setting up a system of  
7 school, the *LM* case where Michigan courts have interpreted the  
8 role of the state versus the role of local government in  
9 providing education, all demonstrate that -- that local school  
10 districts, separate political subdivisions of the state, are  
11 the ones that deliver education in the State of Michigan, and  
12 that's no different from Detroit. And we have pointed out why  
13 these allegations that the state has been in charge of Detroit  
14 schools since 1999 are incorrect and inaccurate legally, not  
15 factually, legally.

16 THE COURT: Okay. Say it again. Go ahead.

17 MR. HAYNES: The *Phillips* case, for instance, the --  
18 part of the argument is that, well, the state appoints -- has  
19 appointed an emergency manager over a series of years, but the  
20 *Phillips* case out of the Sixth Circuit made clear that  
21 emergency managers are local officials, that -- that there is  
22 no right to elect local officials, and whether a state has an  
23 appointive or an elective official doesn't change the nature of  
24 that individual as a local official acting on behalf of that  
25 locality.

1           THE COURT: All right. Let me ask you a question.  
2       Your arguments are persuasive, they're well thought out,  
3       they're supported by analysis and reasoning, but what -- what  
4       if I conclude as a matter of law that they're wrong and the  
5       state does control the schools and the plaintiffs' allegations  
6       are sustainable, if not -- plausible and perhaps sustainable,  
7       where -- where do we go from there then?

8           MR. HAYNES: I guess you're asking if -- if I -- if  
9       you were to rule, not that I would concede --

10          THE COURT: Right.

11          MR. HAYNES: -- that the state is responsible for the  
12       operation of these five discrete schools.

13          THE COURT: Exactly.

14          MR. HAYNES: Five in the whole state.

15          THE COURT: Right.

16          MR. HAYNES: That where does that leave this case?

17          THE COURT: I mean, yeah. Then we have --

18          MR. HAYNES: I suppose at that point, then we get  
19       into some issues of causation and other factual issues that  
20       would have to be explored. I don't know --

21          THE COURT: Okay.

22          MR. HAYNES: -- that that would entitle the  
23       plaintiffs automatically to any type of judgment or relief at  
24       this time.

25          THE COURT: Well, no, I agree with that, but --

1 but -- but it seems to me that if the primary thrust of your  
2 motion is to -- is to divorce the state from the management or  
3 control of these five schools where these five children attend,  
4 then we have to, A, do the constitutional and -- and -- and --  
5 and -- and Supreme Court case analysis that I was looking  
6 forward to and then see what we've got and -- and -- and get  
7 some factual development to determine what -- whether my  
8 initial consideration of the plausibility of the claims in the  
9 Complaint are correct or not, right?

10 MR. HAYNES: Again, I don't think from that  
11 standpoint that there's a factual issue. I think our -- and  
12 maybe I'm misunderstanding, but, you know, part of our  
13 jurisdictional arguments were that these actions aren't  
14 traceable to these defendants.

15 THE COURT: Right.

16 MR. HAYNES: That over -- that -- that is sort of  
17 overarching whether the denial by any -- by someone of rights  
18 to these students based on these conditions would be --

19 THE COURT: Well, I thought --

20 MR. HAYNES: -- would be a viable claim.

21 THE COURT: Right. I thought that was --

22 MR. HAYNES: And that might be a viable claim if --  
23 if -- if the proper actors were before the Court but they're  
24 not.

25 THE COURT: Okay. I thought those issues were well

1 briefed. In terms of standing in particular, I didn't want to  
2 take a great deal of time on that. It -- it -- you know, we've  
3 had a lot of development in the law and I've looked at a lot of  
4 standing arguments over the course of the past few years, and  
5 we all know that *Lujan* is to be read broadly to confer rights  
6 on folks. And I can -- I think I can kind of do the analysis  
7 of injury in fact, a causal connection and redressability based  
8 on the Complaint and -- and the arguments, but, you know, I'll  
9 go back and take a better look at that in light of what you've  
10 had to say here.

11 I would like to say that I have a lot of papers in  
12 front of me here and I was paging through them. The *Papasan*  
13 language that I read to you was not from a concurrence, that  
14 was Justice White writing for the Court, and I think it's  
15 important and worth talking about again. I mean I can't -- I  
16 can't figure out whether or not the court has left open for  
17 courts like this one the opportunity to definitively settle the  
18 question of whether a minimally adequate education is a  
19 fundamental right because at 285 to 286 of the *Papasan* opinion,  
20 Justice White for the court says that the court has not yet  
21 definitively settled those questions. Does that in any way  
22 change the analysis you made of what I ought to do under  
23 *Papasan*?

24 MR. HAYNES: Again, Your Honor, without an  
25 established right, I don't know how this case moves forward.

1 The concept that courts, higher courts might some day address  
2 this issue, they haven't yet, and despite multiple times where  
3 these cases have been raised. And most of these adequacy cases  
4 therefore ended up in state courts and there's, you know, been  
5 a whole series of state court actions under state constitutions  
6 to determine whether minimally adequate education or some level  
7 of minimum education is required by the state under their  
8 constitutions. In our case, our courts, Michigan courts have  
9 said no.

10 THE COURT: Okay. All right. What else would you  
11 like to say here today?

12 MR. HAYNES: You know, I think we've covered the main  
13 things. I guess I would take any other time for rebuttal.  
14 Thank you.

15 THE COURT: Okay. Great. We'll give you at least  
16 ten minutes if you'd like that. Thank you very much for your  
17 argument and your dialogue with the Court.

18 Mr. Rosenbaum, right?

19 MR. ROSENBAUM: Exactly right, Your Honor.

20 THE COURT: From Los Angeles.

21 MR. ROSENBAUM: Came for the good weather, Your  
22 Honor.

23 THE COURT: Well, it's nice to meet you. You  
24 recommended to me one of the nicest, best law clerks I ever  
25 had, but we've never met so it's good to have you in the

1 courtroom.

2 How would you like to open the discussion here?

3 MR. ROSENBAUM: Your Honor, I'd like to open by first  
4 thanking the Court. The Court has had a large number of -- a  
5 large volume of papers before it.

6 THE COURT: Yeah.

7 MR. ROSENBAUM: And I know I'm talking on behalf of  
8 all counsel, we appreciate the sensitivity and the thoroughness  
9 with which the Court has reviewed those papers.

10 THE COURT: Well, I appreciate you telling me that  
11 and, you know, I appreciate the work of counsel, but it's --  
12 it's unusual to get to read this many interesting Supreme Court  
13 cases and I find the -- the issues quite fascinating. So thank  
14 you and go right ahead.

15 MR. ROSENBAUM: Well, I'm eager to talk to the Court  
16 about *Rodriguez* and *Plyler* and *Papasan*.

17 THE COURT: Yes.

18 MR. ROSENBAUM: But let me begin, Your Honor, by  
19 framing the question because counsel has -- has discussed the  
20 case not in keeping with the precise allegations of this  
21 Complaint.

22 THE COURT: Right.

23 MR. ROSENBAUM: What's the question here? The narrow  
24 question before the Court this afternoon as to whether the  
25 plaintiffs' Complaint states, as Your Honor puts it correctly,

1 a plausible claim for relief is this. Where the State of  
2 Michigan has undertaken to provide public education for all of  
3 its students --

4 THE COURT: Yes, because they mandate it, right?

5 MR. ROSENBAUM: That is exactly right, Your Honor.

6 THE COURT: Right, right.

7 MR. ROSENBAUM: It is mandated both with respect to  
8 two provisions of the California Constitution in Article VIII,  
9 provision Sections 2 and 3. And counsel is incorrect in terms  
10 of statutes. As we have cited in our brief, Section 380.1561  
11 and 380.1599 specifically compels all students, all students,  
12 including the plaintiffs in this case, to attend school.

13 THE COURT: Right.

14 MR. ROSENBAUM: There is no discretion here in terms  
15 of where those students must be where there are liberty  
16 interests for at least six hours a day.

17 And so in terms of whether or not the state is  
18 fulfilling its constitutional obligation here, the question  
19 is -- and I am quoting here, Your Honor, from *Rodriguez*.  
20 *Rodriguez* talks about a system, a statewide system, page 37, a  
21 statewide system which "fails to provide each child with an  
22 opportunity to acquire the basic minimal skills necessary for  
23 the enjoyment of the rights of free speech and of full  
24 participation in the political process."

25 So the question here is whether or not the state

1 fulfills its obligation where it compels students, in this case  
2 nearly all of whom are children of color --

3 THE COURT: Right.

4 MR. ROSENBAUM: -- to attend schools that are schools  
5 in name only.

6 THE COURT: Right.

7 MR. ROSENBAUM: Schools which are, as Your Honor  
8 characterized it at the beginning of our discussion this  
9 afternoon --

10 THE COURT: Right.

11 MR. ROSENBAUM: -- schools which are functionally  
12 incapable, that's our allegations, functionally incapable of  
13 affording these children the basic minimal skills essential to  
14 a basic education, denying them, denying these innocent  
15 children the opportunity to achieve access to literacy.

16 THE COURT: Let -- let me -- let me say a couple of  
17 things. Here -- here's my -- and I -- I appreciate the  
18 argument. Here's my issue on *Rodriguez*. *Rodriguez* dealt with  
19 Texas giving unequal funding to different districts based on  
20 property values. The Court said, A, education is not a  
21 fundamental right and therefore rational basis review applies,  
22 and -- and -- and therefore there's a rational basis to the  
23 scheme of funding in that case and -- and therefore they --  
24 they affirmed the statutory scheme.

25 I don't think that's what's at issue here. I think

1 what's at issue here and what I'm trying to figure out and it's  
2 hard for me to do is that in light of what you said after you  
3 cited the case, your position is that these kids are not  
4 getting any education, right?

5 MR. ROSENBAUM: Exactly right, Your Honor. And  
6 that Your -- Your -- Your Honor's citation to *Papasan* is right  
7 on the button.

8 THE COURT: Well, that's the thing that I -- I  
9 mean --

10 MR. ROSENBAUM: Because --

11 THE COURT: -- they say in one paragraph education's  
12 not a fundamental right and then they say, "We've never decided  
13 whether a minimally adequate education is a fundamental right."  
14 If you were to be able to show they're not -- your clients are not  
15 getting a minimally adequate education and that might be a  
16 fundamental right, then I ought to rule that way and apply at  
17 least intermediate scrutiny to the scheme that the state here  
18 is carrying out, right?

19 MR. ROSENBAUM: Well, I agree with the Court.

20 THE COURT: All right.

21 MR. ROSENBAUM: But let me make two points with  
22 respect to this.

23 THE COURT: Okay.

24 MR. ROSENBAUM: First, Your Honor, Your Honor is  
25 exactly correct about *Rodriguez*. *Rodriguez* was a funding case.

1 The argument was that the sort of disparities that the Court  
2 just now characterized, that they -- it inflicted injury to  
3 what the -- what was attempted there to make a fundamental  
4 right of education. That is not this case. That is not what  
5 we are seeking in this case.

6 At page 37 of the *Rodriguez* case, and this is quoted  
7 in *Papasan*, it is quoted in *Kadrmas*, it is quote on the pages  
8 of *Papasan* that Your Honor referred to, 286 and 287, it is also  
9 talked about at page 284 by Justice White, and what the Court  
10 said in *Rodriguez* is, look, no charge is being made here that  
11 the children of Texas, indeed that any child in Texas was being  
12 deprived by the system of education of the opportunity to  
13 acquire the basic minimal skills necessary to exercise those  
14 constitutional rights, and that is the part that Justice White  
15 underlines. When Justice White says, look, there is a funding  
16 system here in Mississippi but no allegations are being made,  
17 just as they were not made in Texas, that that in some way is  
18 impairing the capacity of these children to get from the Texas  
19 system basic minimal skills.

20 Indeed, if Your Honor looks not only at page 37 but  
21 pages 45, 48, 49 and 50 of the *Rodriguez* decision, what the  
22 Court stresses there, emphasizes repeatedly, is that the  
23 children of Texas, every child in Texas was receiving what the  
24 Court described as a basic minimum education. In fact, the  
25 Court says at page 48, it describes the Texas system as a

1 minimum education statewide program.

2 At page 45, in describing the components of that  
3 program, those components, Your Honor, could track what the  
4 Court began our discussion with this afternoon, and that is it  
5 said Texas children had books, Texas children had teachers,  
6 Texas children had principal.

7 Frankly, Your Honor, they didn't dream of the  
8 conditions that exist here where children go to school where  
9 the temperatures are 90 and 100 degrees, where they pass out,  
10 where they throw up, where they suffer heat rash, where they  
11 have to contend with rats, where they have to contend with  
12 vermin, where there are not enough seats in the classroom  
13 because of the extreme overcrowding, where the water is not  
14 undrinkable, where the water is unsafe, where the bathrooms  
15 don't work, where the --

16 THE COURT: All right. I read your -- your -- your  
17 brief and I tried to be fair at the beginning, so let's get  
18 back to --

19 MR. ROSENBAUM: Well, let -- let's -- let me now go,  
20 Your Honor, to both -- to both *Papasan* and *Plyler*.

21 THE COURT: Yeah. All right. *Plyler*, here --  
22 here -- nine years later, same state, Texas, bars the children  
23 of illegal aliens from attending public schools.

24 MR. ROSENBAUM: Not quite.

25 THE COURT: No?

1 MR. ROSENBAUM: Not quite, Your Honor. In --  
2 in -- first of all, I want to state *Plyler* is what Your Honor  
3 said; *Plyler* is an equality case.

4 THE COURT: Say it again.

5 MR. ROSENBAUM: *Plyler* is an equality case.

6 THE COURT: Okay.

7 MR. ROSENBAUM: It is a case about what is the  
8 responsibility there of the State of Texas where it affords a  
9 basic education -- and I want to come to that phrase in just a  
10 moment if I may -- a basic education to nearly all of its  
11 children but leaves out what the court described as a discrete  
12 class, page 230; as a select class, page 221; as an isolated  
13 class, page 221; as a disfavored group, page 222.

14 THE COURT: Yeah.

15 MR. ROSENBAUM: But the Texas statutes, Your Honor,  
16 there were two statutes there, they did not categorically bar  
17 undocumented children from receiving an education. Rather, the  
18 first statute said the children could be required to pay a  
19 tuition, that state wasn't going to fund it, and then left to  
20 local school districts, the second statute, the decision  
21 whether or not, in fact, to charge students a tuition.

22 That is an important distinction, Your Honor, because  
23 it was not, in fact, a categorical denial. It was a functional  
24 denial in terms of saying to the school district, look, if you  
25 don't want to have to pay for these children, you don't have

1 to, but the children still could go to that school.

2 THE COURT: I have a big question about *Plyler* --

3 MR. ROSENBAUM: Yes.

4 THE COURT: -- that -- that I don't understand. And  
5 I believe one of your fellows there at the table used to work  
6 long ago for the -- for the justice who wrote the opinion, so  
7 no disrespect whatever. But education is not a fundamental  
8 right. Justice Brennan said that very clearly in the opinion,  
9 right?

10 MR. ROSENBAUM: Yes, he did, Your Honor.

11 THE COURT: But then they go ahead and apply  
12 heightened scrutiny to a statutory scheme, which I accept what  
13 you say that the scheme was, which is generally not done for  
14 non-fundamental rights.

15 MR. ROSENBAUM: Yes.

16 THE COURT: But they say it's not the kids' fault,  
17 education's important. So I don't know where that leaves me in  
18 terms of what I'm supposed to do.

19 MR. ROSENBAUM: Great question, great question, Your  
20 Honor. I want to answer that in two respects.

21 THE COURT: Okay.

22 MR. ROSENBAUM: First, the actual unit in *Plyler* was  
23 basic education, that's the phrase. Frankly, Your Honor, we  
24 incorporate that in our Complaint and our allegations support  
25 it.

1 I want to give Your Honor the -- the -- the language  
2 here. At page 222, "The inability to read and write will  
3 handicap the individual deprived of a basic education." Later  
4 on 222, "It is difficult to reconcile the cost or the principle  
5 of a denial of basic education and the framework of equality  
6 embodied in the Equal Protection Clause."

7 223, "By denying these children a basic education..."

8 Page 226, "We are reluctant... through no fault of  
9 their own, access to a basic education."

10 A basic education, Your Honor, is not the same thing  
11 as an education. A basic education are the three Rs, either  
12 the basic minimal skills that were talked about *Rodriguez* and  
13 *Papasan*. It is this the capacity to read or write, that's the  
14 unit.

15 Now, let me get to the second point that Your Honor  
16 is making.

17 THE COURT: Yeah.

18 MR. ROSENBAUM: This is what the Court said about  
19 education. And I -- of course Your Honor is right to look at  
20 the majority decision by Justice Brennan, but I also invite the  
21 Court to the concurring decisions of Justice Powell and Justice  
22 Blackmun because this is what is said about education. The  
23 Court said -- no disagreement here in terms of the state of  
24 law. The Court said that education is not a fundamental right  
25 but, but, 221 and 222, "it is not indistinguishable -- it is --

1 it is -- it is not indistinguishable from other forms of social  
2 welfare legislation." Education is different. Education  
3 affects -- and the Court pointed to three interests, all of  
4 which the Court said bear deeply on the demands of the Equal  
5 Protection Clause.

6 One, the Court said that without a basic education,  
7 the three Rs, reading and writing, that without a basic  
8 education, that one of the goals of the Equal Protection  
9 Clause, the capacity of individuals to lift themselves up, to  
10 achieve based on individual merit, the Court said it is -- it  
11 is not possible for children to do that, which is built into  
12 the Equal Protection Clause, education as the great equalizer.  
13 Education is our democracy's engine to ensure that children can  
14 better their circumstances and escape poverty. That's one.

15 THE COURT: All right.

16 MR. ROSENBAUM: Two, the Court says -- and this  
17 completely undercuts their argument about -- they have it  
18 exactly opposite about who *Plyler* applies to. The Court says  
19 that a basic education is the very foundation of citizenship.  
20 The Court says that it is our most vital institution when it  
21 comes to inculcating the values of citizenship. The Court  
22 talks about those basic minimal skills as giving the individual  
23 the capacity to exercise the prerogatives of citizenship, and  
24 our Complaint, Your Honor, is replete with examples of that:  
25 children who cannot possibly master a voting ballot or

1 participate in the political process.

2 And the third piece of the *Plyler* decision that  
3 relates to Your Honor's question about education, the Court  
4 said that where a child does not receive a basic education,  
5 cannot read and write, that's the language picked up in  
6 *Papasan*, that is the language that is picked up in *Kadrmas*,  
7 where a child does not, that child will suffer the brand of the  
8 state and the stigma of illiteracy which will be a lifelong  
9 hardship, a lifelong hardship that will follow that child and  
10 keep that child from our civic institutions and keep that child  
11 from contributing to our society.

12 Now --

13 THE COURT: Let me -- let me -- let me engage with  
14 you a little bit. I -- I understand and I really respect the  
15 amount of command you have of the cases and I -- I know they  
16 say what you say they do. But I think what I need to determine  
17 in a very straightforward manner is whether your -- I mean,  
18 okay, we should talk about what your argument is and then how  
19 it survives dismissal. If you're saying that they received,  
20 the students that is, no education, then the case is like  
21 *Plyler* and we look at -- we give intermediate scrutiny to the  
22 scheme that is at issue and -- and go from there. If -- if  
23 your argument is that the education is just really, really bad,  
24 then they were deprived of a minimally adequate education and  
25 we would I guess have to apply, me apply, rational basis

1 scrutiny.

2 But the whole thing that I can't figure out at this  
3 point is how do I, without any facts in these allegations that  
4 you've made and just recited and that Mr. Haynes say are  
5 implausible and improper legal conditions, how do I determine  
6 what's a minimally adequate education or no education at all  
7 without testimony, discovery expert reports and some sort of  
8 determination that would allow -- I mean I can't say what an  
9 education is and isn't, right? I mean we need to have some  
10 evidence on this I would think.

11 MR. ROSENBAUM: Your Honor, we are looking forward to  
12 presenting that evidence and conducting that discovery, but I  
13 want to be clear in terms of what we have precisely alleged in  
14 this Complaint because that's the test.

15 THE COURT: Yes. I tend to mix a lot of questions up  
16 with one. So go ahead.

17 MR. ROSENBAUM: Well, I tend to mix a lot of answers  
18 up, Your Honor, so...

19 THE COURT: Go right ahead.

20 MR. ROSENBAUM: So the question here is precisely  
21 what the Court said. This -- this, Your Honor -- there may  
22 well be cases where there are close questions as to whether or  
23 not children, innocent children, children who through no fault  
24 or failure of their own are assigned, compelled to go to these  
25 schools. There may be close cases. This is not one of them,

1 Your Honor.

2 In this case we are saying exactly what Your Honor is  
3 underlining. We are saying that these children do not come  
4 anywhere close to a basic education. Why is that? Because the  
5 core components of a basic education -- the components,  
6 frankly, Your Honor, you don't need a constitutional scholar to  
7 talk about -- are there qualified certificated teachers in the  
8 classroom who are teaching within the area of their expertise  
9 and experience, who are trained and capable of teaching reading  
10 or intervening where appropriate?

11 Are there books? Are there books? This is 2017 and  
12 the state is arguing that it is constitutional to have a system  
13 that doesn't supply its children, the children with teachers  
14 and books and instructional materials and labs and computers.

15 These are schools, Your Honor, as we have  
16 specifically alleged, where basic curricula, reading, science,  
17 languages, math, are not offered in the classroom and instead  
18 students are sent -- there's students in this courtroom today  
19 who were sent to a gym to sit for periods on end and then they  
20 were sent after two -- two or more periods to other core  
21 classes where there were substitutes, and not substitutes like  
22 Your Honor and I had when we went to school, substitutes for a  
23 day or two who still had a lesson plan. We're talking about  
24 unqualified, non-certificated substitutes who don't have a clue  
25 about the subject areas.

1           And then the conditions which Your Honor correctly  
2           described as the deplorable conditions.

3           That, Your Honor, we need to -- we have alleged  
4           sufficiently to go to trial on the question as to whether these  
5           children are, in fact, receiving a basic education or indeed  
6           any education at all.

7           The proficiency scores that Your Honor cited at the  
8           beginning of this hearing, zero, zero. What does that mean?  
9           It means there's not a single child in that school who is  
10          proficient.

11          Whether or not that, in fact, constitutes a basic  
12          education, what are the specific facts that we have alleged?

13          THE COURT: Well, wait a minute. Let me -- let me  
14          ask you to -- to address something before we run out of time  
15          here. Mr. Haynes takes the position, as I understand it,  
16          that -- let's say everything you're -- you're laying out here  
17          is true, proper, acceptable, factually to the Court. I get the  
18          sense what he's saying is, all right, fine, but the state's not  
19          responsible for any of those outcomes. The principals, the men  
20          and women who sweep the floors, the -- the -- the -- the  
21          building acquisition personnel who don't get books, the  
22          painters who don't paint, you know, these are the people who we  
23          ought to hold accountable for this, not -- not the state. And,  
24          in fact, the plaintiffs here haven't even alleged any sort of  
25          statute or regulation that governs what the state's doing here,

1 so we need to step back and make sure that -- that -- that Mr.  
2 Rosenbaum and his clients have sued the right parties. What's  
3 your take on that?

4 MR. ROSENBAUM: Well, Your Honor, I don't -- I don't  
5 mean to be disrespectful but that's silly, isn't it?

6 The issue here as framed by *Rodriguez* to begin with  
7 is whether or not the state's educational system -- the state  
8 is responsible for a statewide system in education. We're not  
9 talking about some painter who doesn't paint a wall. We're  
10 talking about a statewide system that fails to provide, that  
11 fails to provide --

12 THE COURT: Maybe I heard him wrong. Isn't that what  
13 Mr. Haynes basically said?

14 MR. ROSENBAUM: If -- if -- if he said statewide  
15 system, Your Honor, the case --

16 THE COURT: No, no, no. I'm saying the way I posited  
17 my question --

18 MR. ROSENBAUM: Yeah. And what I'm suggesting to you  
19 is our complaint isn't about a painter. Our complaint is about  
20 a statewide system that is failing to provide basic minimal  
21 skills and basic education while at the same time there are  
22 state statutes, I quoted them earlier --

23 THE COURT: But -- but there's none at issue here.  
24 Do you think I can perform the analysis that we're -- that  
25 we're talking about without having a statute?

1 MR. ROSENBAUM: Of course.

2 THE COURT: I mean *Rodriguez* had one, *Plyler* had one.

3 MR. ROSENBAUM: Of course, Your Honor. Imagine if  
4 *Plyler* -- first of all, as I said, *Plyler* itself does not stand  
5 for that proposition. *Plyler* involved two statutes, but they  
6 did not, in fact, say to undocumented children you can't go to  
7 school. They were -- it was a functional exclusion in the same  
8 way that the children here face a functional exclusion.

9 Does it -- would it make any difference, Your Honor,  
10 if in Texas, say, down at Brownsville or at El Paso, that  
11 instead of these enabling statutes, children, undocumented  
12 children went there and they got inside the school and they  
13 walked inside the school and there were no teachers or books,  
14 would it have made any difference to the analysis? Where is  
15 the case anywhere that stands for the proposition that state  
16 action has to depend on a particular statute? As I said, we  
17 have the --

18 THE COURT: Okay. I guess --

19 MR. ROSENBAUM: -- we have the statute here. I'm  
20 sorry.

21 THE COURT: No, I understand your point and it's well  
22 argued.

23 What -- what -- I guess I'm thinking, and I'm  
24 actually kind of thinking more about what we're discussing  
25 rather than what I have prepared for here today. But I mean in

1 terms of remedies, you know, we -- we -- we've got to find a  
2 way I would imagine, if everything -- if everything in the  
3 Complaint is proven and there's a judgment, we have to find a  
4 way to ultimately make sure that the state law that excludes  
5 the students from education is rectified. I mean I can strike  
6 down a statute, I can, you know, order something to be enjoined  
7 as -- as outside of the Equal Protection Clause, but I don't  
8 know that I can just willy-nilly say, you know, here's what  
9 you've got to do, State of Michigan schools, you've got  
10 to -- you know, I'm not capable of that. I need to look at  
11 something I think specific to -- to remedy.

12 MR. ROSENBAUM: I -- I agree with that, Your Honor.

13 THE COURT: Yeah.

14 MR. ROSENBAUM: And -- and frankly, Your Honor, this  
15 isn't rocket science, it's not even high school science, what  
16 we're asking the Court to say in this particular situation.

17 What we're saying, Your Honor, is that where a  
18 statewide system lacks the core components necessary to provide  
19 a basic education, teachers, books, core -- a basic curricula  
20 and the conditions that stand in the way of children being able  
21 to learn and teachers being able to teach, the Court can say,  
22 in terms of its equitable powers, look, state, you're the  
23 experts. States all over the United States -- my goodness, one  
24 need only take a five-minute drive from our schools to Grosse  
25 Pointe. The state knows how to run a system where there are

1 teachers in classrooms who are qualified and books in  
2 classrooms and books to take home for homework and where eighth  
3 graders are not teaching math classes and where children are  
4 not lumped in great groups of 60 to 80 and just put in an  
5 auditorium or just put in a gym or where schools don't say,  
6 "Can anybody hear speak Spanish? You're our Spanish teacher."

7           What the Court -- what we're asking the Court to say  
8 to the state is you're the expert, I'm not. Do what other  
9 communities in Michigan, do what every state in the union does  
10 and fix this system so that all children have access to the  
11 basic minimal skills. If the temperatures are 100 degrees in a  
12 classroom, if the temperatures are below freezing so that  
13 children are shivering, so that children are wearing winter  
14 coats, fix that. We do that in our homes all the time, we do  
15 it in offices all the time, we do it in this courtroom.  
16 Getting a -- a temperature that is room temperature does not  
17 require any special expertise.

18           School systems all over the country do not depend on  
19 eighth graders to teach their math classes. School districts  
20 all over the country do not say to children, here, 30 to  
21 40 percent of your teachers will not be certificated. Instead  
22 of learning math today, you're going to watch "Frozen," you're  
23 going to watch Kung Fu Panda 3," as the students in this case  
24 were required to do.

25           THE COURT: All right. I have two brief questions

1 and then you can finish up and -- and conclude your argument  
2 and -- and say whatever else you believe to be important.

3 I didn't want to leave you without talking a little  
4 bit about *Obergefell*.

5 MR. ROSENBAUM: Yes.

6 THE COURT: Yes. That was -- that was -- trying to  
7 get the year on that.

8 MR. ROSENBAUM: It was two terms ago.

9 THE COURT: *Obergefell* basically lays out the  
10 identification and protection of fundamental rights and talks  
11 about history and tradition guiding and disciplining the --  
12 the -- yes, you're right, that was 2015 term and --

13 MR. ROSENBAUM: Justice Kennedy's decision.

14 THE COURT: -- and relies on *Poe vs. Ullman*.

15 I wonder if that's the case I should be using or if  
16 that in any way affects the standard for determining what's a  
17 fundamental right. If so, it appears that this *Glucksberg* case  
18 speaks a little bit to the issue. Fundamental rights are only  
19 those, quote, "objectively, deeply rooted in the Nation's  
20 history and tradition, implicit in the concept of ordered  
21 liberty such as -- such that neither liberty nor justice would  
22 exist if they were sacrificed." Education might be one sort of  
23 right that falls within that definition. I just wanted to have  
24 the opportunity --

25 MR. ROSENBAUM: Great.

1 THE COURT: -- to hear from you on that.

2 MR. ROSENBAUM: Great. Let me just stress again,  
3 Your Honor, I don't want to be defensive about this because I  
4 believe --

5 THE COURT: No.

6 MR. ROSENBAUM: -- there is a fundamental -- this  
7 Court does not have to overrule *Rodriguez*.

8 THE COURT: I'm not overruling anything.

9 MR. ROSENBAUM: No, I'm not -- we're not asking the  
10 Court -- in fact, our -- what we're --

11 THE COURT: I know my place, Mr. Rosenbaum. Go  
12 ahead. I'm sorry.

13 MR. ROSENBAUM: And what, in fact, we're saying, Your  
14 Honor, is that it is the state's position that is not  
15 reconcilable with *Rodriguez* and *Plyler*, and I'm glad the Court  
16 raised *Obergefell* as well. We are not talking a fundamental  
17 right of education. To the extent that -- as I said, our  
18 principal argument is an equality argument, but the precise  
19 issue left open in *Rodriguez* and that Justice White talked  
20 about in *Papasan* and that was discussed in *Kadrmas*, a right of  
21 access to a basic education, *Obergefell* is right on the button,  
22 Your Honor.

23 THE COURT: Okay.

24 MR. ROSENBAUM: And so is *Glucksberg*. *Glucksberg*, as  
25 Your Honor will recall, was the decision by Chief Justice

1 Renquist that looked to history and tradition. We meet that  
2 test, we meet that test. In 1837 when Michigan became a state,  
3 one of the conditions of that statehood was that it provide  
4 public education for all children. In 1868 when the 14th  
5 Amendment was ratified, 36 out of 37 states required basic  
6 education and required children to sustained. And as the Court  
7 pointed out in *Yoder* at page 221, some level of basic education  
8 is required in order for us to have an open system of  
9 democracy. So based on -- based on the notions of where public  
10 education stood and what a basic education was, we easily meet  
11 the test of *Glucksberg*.

12 In *Obergefell*, Your Honor will recall, Justice  
13 Kennedy said, well, we're not overruling *Glucksberg*, but  
14 sometimes our basic mores change as a democracy. So even if  
15 marriage between two individuals of the same gender could not  
16 be supported by history and tradition at the time that the  
17 Constitution was written, now, now our notions of dignity, our  
18 notions of intimacy, our notions of how an individual should be  
19 free to define him or herself by whom he chooses to love, those  
20 values, even if they were not part of history and tradition, we  
21 have evolved to that state, and that's frankly part of the  
22 argument between Justice Kennedy and certain members of the  
23 dissent.

24 THE COURT: Do you think *Ober* -- *Obergefell* changed  
25 the inquiry then of what constitutes the fundamental right, or

1 would the result here or in that case have been the same if you  
2 applied *Glucksberg*?

3 MR. ROSENBAUM: Either way, Your Honor, either way.  
4 I think what *Obergefell* did was expand what it takes in order  
5 for a putative right to be regarded as a fundamental right, but  
6 we went either way.

7 Is there anything more basic in terms of the respect  
8 for the constitutional values? My goodness, *Plyler* says,  
9 *Plyler* says how can an individual participate in terms of his  
10 or her civic responsibilities, his or her civic opportunities  
11 if he or she is denied a basic education?

12 And -- and if I may, Your Honor, it -- it completely  
13 vexes me how the state says, well, that applies to undocumented  
14 persons but it doesn't apply to citizens. Could anything make  
15 less sense? The inquiry in *Plyler*, the opening inquiry in  
16 *Plyler* was whether or not, in fact, undocumented persons should  
17 be considered persons for the purposes of the 14th Amendment to  
18 compare to citizens.

19 Take a look, Your Honor, at the concurring decisions  
20 of Justice Powell and Justice Blackmun. In *Plyler*, the  
21 concern, a principal concern, not the sole concern but a  
22 principal concern is, look, some unspecified number of the  
23 class in *Plyler* will one day be citizens and how can we deny  
24 citizens a basic education? And I really want to emphasize  
25 that's the language, that's the language.

1           In this case, Your Honor, virtually all our children  
2 are citizens. Everything that *Plyler* says about the  
3 relationship between basic education and citizenship applies in  
4 spades in this case. And, Your Honor, this would apply no  
5 matter what the group is: white students, black students,  
6 Latino students or any group of students. It's not race based,  
7 it's not class based. What the Court says in *Plyler* is any  
8 discrete group, any isolated group.

9           Which brings me to the last point I want to make.  
10 Your Honor asked counsel, Your Honor asked counsel about what  
11 the interest is here and what's the level of review. I want to  
12 say two things with respect to that. I believe, as the Court  
13 has suggested -- I don't want to put words in Your Honor's  
14 mouth, but I believe, as the Court has suggested, the proper  
15 standard here is heightened scrutiny. Goodness, if that  
16 applied for a class of undocumented persons, surely it applies  
17 to a group of citizens. And frankly, Your Honor, looking at  
18 *Bakki* at page 387, looking at *Katzenbach vs. Morgan* at page 653  
19 and 654, these students are primarily black, and we ought to  
20 take historical note of the fact from those cases that literacy  
21 and access to literacy and access to basic education has been  
22 the methodology of stigmatizing.

23           So I think we fit right in terms of the equality  
24 occasion. I don't think any of the distinctions that are  
25 proposed by -- by the state with respect to *Plyler* make any

1 sense. But, Your Honor, quite frankly, we win under rational  
2 basis too.

3 THE COURT: All right. Well -- well -- well, I was  
4 going to say it a different way. If -- if I'm reading you  
5 right, a functionally -- a functional equivalent of no  
6 education, which I think you're trying to argue lies here, and  
7 a minimally acceptable education that Justice White wrote of or  
8 a basic education are all the same sort of thing, which are --  
9 are -- are deserving -- fundamental rights that -- that  
10 children are deserving of regardless of race, religion,  
11 location. We need to do an equal protection analysis --

12 MR. ROSENBAUM: Exactly. But let me say, Your Honor,  
13 it is below basic. That's what our allegations are, that this  
14 is below basic. That if I send students into a room where  
15 there's no teacher and no books and no homework and no courses,  
16 that's not a school, Your Honor, that's a warehouse.

17 THE COURT: I know. I'm just trying to determine the  
18 standard.

19 Let -- Let me ask something else.

20 MR. ROSENBAUM: May -- may I make one more point with  
21 respect to rational --

22 THE COURT: Yeah, one more point, but answer this  
23 question before I forget it. It -- this is totally  
24 housekeeping. I -- I had the docket up here and I've been  
25 taking a look at it. Did you dismiss voluntarily some of the

1 claims? I'm -- I'm just curious where we are right now on  
2 this.

3 MR. ROSENBAUM: We did.

4 THE COURT: You've got five plaintiffs, due process  
5 and equal protection claims. You -- you won an injunction and  
6 I just wanted to get -- get -- get straight with you.

7 MR. ROSENBAUM: That's right, but if Your Honor  
8 thinks we were mistaken, we'd be glad to put them back.

9 THE COURT: No, I don't. I'm just --

10 MR. ROSENBAUM: But, yes, that's -- that's accurate.

11 THE COURT: Yeah, okay.

12 MR. ROSENBAUM: Let me make my last point. Your  
13 Honor has been very patient. Let me make my last point with  
14 respect to rational basis, and the comparison to *Rodriguez* and  
15 the comparison to *Plyler* is extremely instrumental in this  
16 regard.

17 Your Honor said it exactly right earlier. *Plyler* --  
18 *Rodriguez* said we're not dealing with a case where kids, where  
19 children did not get basic minimal skills. The precise  
20 interest that the State of Texas had then was to say can we  
21 experiment with our funding system where there's a floor, where  
22 there is this minimum adequate statewide educational program?  
23 And the Court said, well, of course that meets rational basis.  
24 And the interest of federalism, *New State Ice*, 1932 decision by  
25 Justice Brandeis, dissent by Justice Brandeis, of course they

1 can experiment with that. If they think that that's going to  
2 improve parent involvement, local involvement, well, of course  
3 they can do that.

4 That's not our case. That's not our case. And the  
5 court said in *Plyler*, in *Plyler*, recognizing at page 220 that  
6 where children are undocumented, where the status is  
7 undocumented, the court specifically said we recognize the  
8 state could have interests with respect to that. But when it  
9 comes to denying functionally a basic education, the court  
10 found those -- those interests wholly insubstantial. In fact,  
11 the court says specifically that that doesn't meet the rational  
12 basis test, that there is no rational reason for punishing  
13 these children.

14 Your Honor, on a rational basis test, we  
15 automatically defeat a motion to dismiss in order to  
16 demonstrate that a class having a system that does not provide  
17 teachers, books, courses and the conditions conducive to  
18 learning fails even a rational basis test.

19 THE COURT: Okay. All right. Great. Thank you.  
20 I've asked all my questions and I take it you've made all your  
21 arguments and I'm grateful for the -- the passion and the  
22 completeness with which you've approached the issue.

23 MR. ROSENBAUM: Thank you for your patience, Your  
24 Honor.

25 THE COURT: My pleasure. Good job.

1           Let's hear Mr. Haynes. You've got the final word  
2 because you have filed the motion, have the burden on it. We  
3 would be very happy to hear your response to Mr. Rosenbaum or  
4 anything else you'd like to say. Go right ahead.

5           MR. HAYNES: Thank you. You know, just a couple  
6 observations. You had asked -- or Mr. Rosenbaum said that it's  
7 so easy that -- that what's -- what's missing here is that the  
8 state has not put qualified teachers, books and curricula into  
9 the classrooms in these classrooms in these five buildings, and  
10 you asked how this Court could remedy it, and he said, well,  
11 you just look down the road, look at Grosse Pointe.

12           Well, here's the problem. The state doesn't run that  
13 district either. Its local school board runs that district,  
14 makes those decisions. The state doesn't authorize districts  
15 to use unqualified teachers. We have laws that require  
16 teachers have, you know, appropriate certifications. There's  
17 some exceptions to those. But again, this -- this failure to  
18 have teachers, textbooks and curriculum are not decisions that  
19 are made at the state basis, at the state level. Those are  
20 local government decisions. The allocation of those resources  
21 are local.

22           THE COURT: So --

23           MR. HAYNES: So --

24           THE COURT: -- if I were to --

25           MR. HAYNES: In essence, he's asking the Court to

1 order these defendants, including the governor, to take over  
2 these schools and to get involved in the day-to-day operation,  
3 the governor, state officials, run five discrete schools in the  
4 City of Detroit.

5 THE COURT: Well, but -- but -- but I understand that  
6 that's the whole crux of the matter because there's an  
7 emergency manager, there's been this funding. The state made  
8 an exception long ago, as I understand it, to -- to -- to take  
9 control and -- they made a decision, policy based, to take  
10 control and try to do something in 1999 with what was going on  
11 in -- in the schools. That's my understanding of -- of why  
12 we're here as we are today. Go ahead.

13 MR. HAYNES: Sure. The state reacted as it could  
14 to -- again, when we're talking about emergency managers, we're  
15 talking about state laws that have been determined to be -- to  
16 satisfy constitutional muster, but those laws appoint local  
17 officials to run local governments; it's not the state.  
18 That -- that individual, the emergency manager, an emergency  
19 financial manager, all those individuals, the *Phillips* case  
20 talked about it, those are appointed local officials, but it  
21 doesn't change the nature as a local official.

22 THE COURT: Okay.

23 MR. HAYNES: So, you know, I -- I disagree with the  
24 interpretation of *Plyler*. *Plyler*, again, it -- it wasn't about  
25 a basic level of education. There may have been narrative

1 discussions. You know, there were narrative discussions about  
2 education and -- and illiteracy and the social ills that  
3 those -- that illiteracy can cause in *Brown*, in *Rodriguez*, in  
4 *Plyler*. Yet despite all those discussions, when you look at  
5 the decisions, they found that education was still not a  
6 fundamental right, that -- regardless of those importance.

7 And so when you talk about *Obergefell*, that's a  
8 distinction. Here you have a whole history of jurisprudence  
9 that says that education is not a fundamental right. But the  
10 court in that case said when you look at the history of our  
11 jurisprudence and our society, marriage is a fundamental right.

12 THE COURT: Right.

13 MR. HAYNES: And so again, there's -- there's just no  
14 heightened scrutiny here. There's -- there's been no attempt  
15 to identify a specific state statute that treats these five  
16 schools any different from the other schools in the Detroit  
17 Public School District or the -- the thousands of other school  
18 buildings throughout the state. So the failure to allocate  
19 textbooks is not a state level decision; that's an operational  
20 decision at the local level.

21 The -- you know, the governor, the Director of the  
22 Department of Technology, Management and Budget, the school  
23 reform officer, the Superintendent of Public Instruction, the  
24 state board members don't make those types of determinations,  
25 and that's exactly what the *LM* case, the state Court of Appeals

1 case that interpreted these roles has said.

2 So I appreciate your time and I appreciate, as  
3 counsel does, all the effort that's gone into this and will  
4 continue to go into this case as you review it. Thank you.

5 THE COURT: Okay. All right. Thank you very much,  
6 Mr. Haynes.

7 MR. ROSENBAUM: Your Honor, may I have 30 seconds to  
8 respond?

9 THE COURT: No, you may not have 30 seconds to  
10 respond. I mean I -- I -- what are you going to say that  
11 hasn't been said? Go ahead, Mr. Rosenbaum, you can speak from  
12 your table there. But generally we have the defendant, the  
13 plaintiff and the defendant and then we -- we -- we take it  
14 under advisement, but go ahead. What's -- what's so important  
15 that you have to talk about?

16 MR. ROSENBAUM: I just wanted to correct two  
17 statements. One, in fact, as alleged in our Complaint, in  
18 June 2016 the State of Michigan passed a law that permits  
19 unqualified, uncertificated teachers to teach in the Detroit  
20 school system. It is only the Detroit school system that is  
21 the subject of that legislation.

22 Two, the -- the -- the attorney for the state said  
23 that they didn't -- that the state never ran the schools here.  
24 As I said, that is immaterial given that it's a system given to  
25 statutes. However, that's exactly what happened. The State of

1 Michigan dissolved the local school board. The emergency  
2 manager took full control. The SRO office runs our schools,  
3 the lowest five percent of the schools in terms of the  
4 day-to-day operations themselves as part of the system. The  
5 State of Michigan was -- was absolutely the -- the -- the  
6 perpetrator of those acts. They were operating it. And, Your  
7 Honor, just like they can't break something in the Pottery Barn  
8 and leave it behind, that's what happened here, and the state  
9 has to provide a system where everybody gets the opportunity to  
10 learn.

11 THE COURT: Okay. All right. Thank you for those  
12 additional remarks. The matter will be taken under advisement.

13 I must say that, as I did at the outset, preparing  
14 for the hearing and participating in it was a great  
15 professional privilege. Both sides worked very hard in arguing  
16 the motions and writing the briefs. The Court's extremely  
17 grateful. We will try to get an answer to these nettlesome  
18 questions to you in the form of an order resolving the motion  
19 to dismiss by the State of Michigan as soon as possible.  
20 Usually I say 30 days, this might take a little longer, but  
21 we'll -- we'll stay in touch and see where we go after this.

22 In the meantime, have a pleasant afternoon. Thanks  
23 for staying within your time. And we'll be in recess now.

24 THE LAW CLERK: All rise. The Court is in recess.

25 (Court in recess at 3:11 p.m.)

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C E R T I F I C A T I O N

I, Linda M. Cavanagh, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages 1 through 50 comprise a full, true and correct transcript of the proceedings held in the matter of Gary B., et al versus Richard D. Snyder, et al, Case No. 16-13292, on Thursday, August 10, 2017.

s/Linda M. Cavanagh  
Linda M. Cavanagh, CRR, RMR, RDR  
Federal Official Court Reporter  
United States District Court  
Eastern District of Michigan

Date: August 17, 2017  
Detroit, Michigan